

1-1-2014

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### Recommended Citation

Eric T. Fleischaker, *The Constitutionality of Prolonged Administrative Segregation for Inmates Who Have Received Sex Reassignment Surgery*, 41 HASTINGS CONST. L.Q. 903 (2014).

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# The Constitutionality of Prolonged Administrative Segregation for Inmates Who Have Received Sex Reassignment Surgery

by ERIC T. FLEISCHAKER\*

## Introduction

In 2012, a Massachusetts district court judge issued a controversial decision in *Kosilek v. Spencer (Kosilek II)*<sup>1</sup> when he ordered the state to pay for a transgender<sup>2</sup> inmate's sex reassignment surgery.<sup>3</sup> The decision is controversial for two reasons: First, the court ordered the state to fund a surgery for a prisoner that Medicare or Medicaid would not cover for an unincarcerated person. Secondly,

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\* J.D. 2014, University of California, Hastings College of the Law; B.A. 2009, Washington University in St. Louis. I would like to thank the editors of the *Hastings Constitutional Law Quarterly*. Thank you to my parents for their continued support of my education. Lastly, thank you to my wife, Margaret, for her unending encouragement and patience.

1. *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190 (D. Mass. 2012). See also Associated Press, *Convicted killer sues state for free sex change*, NBCNEWS.COM (May 31, 2006, 5:15 PM), [http://www.msnbc.msn.com/id/13068147/ns/us\\_news-weird\\_news/t/convicted-killer-sues-state-free-sex-change/#.UQXBel7A9UQ](http://www.msnbc.msn.com/id/13068147/ns/us_news-weird_news/t/convicted-killer-sues-state-free-sex-change/#.UQXBel7A9UQ); Wendy Kaminer, *Is Denying Treatment to Transsexual Inmates 'Cruel and Unusual'?*, THE ATLANTIC (Sept. 7, 2012, 4:20 PM), <http://www.theatlantic.com/national/archive/2012/09/is-denying-treatment-to-transsexual-inmates-cruel-and-unusual/262074/>.

2. "Transgender" is:

An umbrella term . . . for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Use the descriptive term (*transgender*, *transsexual*, *cross-dresser*, FTM or MTF) preferred by the individual. Transgender people may or may not decide to alter their bodies hormonally and/or surgically.

GLAAD Media Reference Guide—*Transgender Glossary of Terms*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Apr. 14, 2013)

3. "Refers to surgical alteration, and is only one small part of transition . . . Preferred term to 'sex change operation.'" *Id.*

the decision left open the question about what to do with the inmate after the operation. The court decided not to address the second issue, finding that it was not yet ripe.<sup>4</sup>

Finding for the plaintiff, the court utilized a five-step Eighth Amendment test to determine when an inmate has a constitutional right to medical services or care,<sup>5</sup> and found that the state has a duty to provide a transgender prisoner with sex reassignment surgery.<sup>6</sup> In so finding, the court opened the door to the extent of this duty.<sup>7</sup> The court explained that the question of the constitutionality of Kosilek's placement in isolation in the men's prison for an indeterminate amount of time, even if done for her protection, was not yet ripe.<sup>8</sup> This Note continues this analysis by first discussing whether the issue is in fact ripe. Then, ripeness notwithstanding, this Note analyzes the constitutionality of placing Kosilek in solitary confinement for an indeterminate period of time—even if done for her safety.

## I. The Factual and Procedural Background of *Kosilek II*

Michelle Kosilek suffers from Gender Identity Disorder.<sup>9</sup> She<sup>10</sup> was born “Robert”—a boy—and from the time she was ten years old she felt she was a woman trapped inside a man's body.<sup>11</sup> Because of her condition, Kosilek abused drugs and took female hormones when she had access.<sup>12</sup>

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4. *Kosilek II*, 889 F. Supp. 2d at 243–44.

5. *Id.* at 200.

6. *Id.* at 250–51.

7. *See id.* at 243–44.

8. *Id.*

9. *Kosilek v. Maloney (Kosilek I)*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002). “Gender Identity Disorder” is

A controversial . . . diagnosis given to transgender and other gender-variant people. Because it labels people as “disordered,” Gender Identity Disorder is often considered offensive. The diagnosis is frequently given to children who don't conform to expected gender norms in terms of dress, play or behavior. Such children are often subjected to intense psychotherapy, behavior modification and/or institutionalization. Replaces the outdated term ‘gender dysphoria.’

GLAAD MEDIA REFERENCE GUIDE—TRANSGENDER GLOSSARY OF TERMS, *supra* note 2.

10. While court documents and the state of Massachusetts use “he” and “him” in referring to Kosilek, this Note uses pronouns that align with the subject's self-identification.

11. *Kosilek I*, 221 F. Supp. 2d at 163.

12. *Id.*

Her desire to become a woman led to frequent physical and mental abuse.<sup>13</sup> Her stepfather stabbed her when she told her family about her feelings.<sup>14</sup> In the early 1970s, Kosilek took female hormones and developed breasts.<sup>15</sup> During this period, Kosilek was briefly imprisoned and gang raped twice during her incarceration.<sup>16</sup> Two men at a gay bar also beat her because of her desire to become a woman.<sup>17</sup> Despite the abuse, Kosilek never sought professional treatment for her condition.<sup>18</sup>

Kosilek eventually entered a drug rehabilitation facility.<sup>19</sup> There, she met Cheryl McCaul, a volunteer counselor at the facility, who told Kosilek that a “good woman” would cure her transsexualism.<sup>20</sup> The two later married.<sup>21</sup> One day McCaul came home and found Kosilek in women’s clothing.<sup>22</sup> McCaul became angry and began to fight Kosilek, who strangled McCaul to death.<sup>23</sup> In 1992, Kosilek was convicted of murder and sentenced to life in prison without parole.<sup>24</sup>

In prison, Kosilek took female hormones that she purchased illegally.<sup>25</sup> Due to her mental anguish, she tried to kill herself twice and even attempted to castrate herself.<sup>26</sup>

In 2000, the Massachusetts Department of Corrections (“DOC”) adopted a blanket policy regarding the treatment of transsexual prisoners.<sup>27</sup> The policy dictated that transsexual prisoners would receive the same treatment they were receiving at the time of their incarceration.<sup>28</sup> Since Kosilek illegally obtained hormonal treatment at the time of her incarceration, the DOC denied hormonal treatment

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 163.

18. *Id.* at 163–64.

19. *Kosilek II*, 889 F. Supp. 2d 190, 213 (D. Mass. 2012).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 214; *Kosilek I*, 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

25. *Kosilek I*, 221 F. Supp. 2d at 159.

26. *Id.* at 158.

27. *Id.*

28. *Id.* at 159–60.

for her gender identity disorder despite the severity of her symptoms.<sup>29</sup>

Kosilek brought suit challenging the DOC's policy and decision to withhold treatment as violations of the Eighth Amendment.<sup>30</sup> In *Kosilek v. Maloney (Kosilek I)*, the court explained that the Eighth Amendment does not permit the unnecessary infliction of pain on a prisoner, either intentionally or because of the deliberate indifference of the responsible prison official.<sup>31</sup> The district court ruled against Kosilek, finding that she did not prove the DOC's failure to provide adequate care was because of deliberate indifference.<sup>32</sup>

Subsequently, in 2011, the Seventh Circuit Court of Appeals held that a state statute prohibiting hormone therapy and sex reassignment surgery for any prisoner violated the Eighth Amendment because the statute constituted deliberate indifference to the inmates' serious medical needs.<sup>33</sup> In addition, the DOC changed commissioners and Kosilek started receiving hormone treatment and psychotherapy.<sup>34</sup>

Under the new commissioner, DOC doctors adopted the standards of care generally accepted by the psychological community: the "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People" ("Standards of Care").<sup>35</sup> Following these Standards of Care, the doctors concluded that Kosilek required a sex reassignment surgery to treat her gender identity disorder.<sup>36</sup> Kosilek had already tried to kill and castrate herself, and the doctors explained that her symptoms would only

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29. *Id.*

30. *Id.*

31. *Id.* at 161.

32. *Id.* at 195.

33. *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) (cited in *Kosilek II*, 889 F. Supp. 2d 190, 197 (D. Mass. 2012)).

34. *Kosilek II*, 889 F. Supp. 2d at 201.

35. *Id.* at 197 n.1. See E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7, 13 INT'L J. OF TRANSGENDERISM 165, 165 (2011) (The World Professional Association for Transgender Health publishes the Standards of Care "to provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.").

36. *Kosilek II*, 889 F. Supp. 2d at 197 (DOC Commissioner Dennehy testified in 2006 that she understood and accepted the DOC doctors' view that "Kosilek is at substantial risk of serious harm and that sex reassignment surgery is the only adequate treatment.").

worsen unless she received the operation.<sup>37</sup> The DOC commissioner, Kathleen Dennehy, acknowledged that she understood and accepted the doctors' conclusion, but denied Kosilek the sex reassignment surgery because the treatment would create insurmountable security problems.<sup>38</sup>

Kosilek sued again to challenge the DOC's refusal to provide her with adequate treatment.<sup>39</sup> She asserted that the DOC violated her Eighth Amendment right by refusing to provide the medical treatment necessary for her well being and that such violation would continue until a court orders the DOC to provide her prescribed treatment.<sup>40</sup>

## **II. The Court's Five-Step Test to Assess Kosilek's Eighth Amendment Challenge**

The Eighth Amendment forbids the infliction of "cruel and unusual punishments."<sup>41</sup> The Supreme Court has interpreted the Eighth Amendment proscription on cruel and unusual punishment to protect prisoners from the unnecessary infliction of pain by prison officials.<sup>42</sup> The infliction of pain rises to the level of "cruel and unusual" when it results from an intentional act or "deliberate indifference" to a prisoner's medical needs.<sup>43</sup> For neglect of a prisoner's medical needs to qualify, it must be intentional and "repugnant to the conscience of mankind."<sup>44</sup> Inadvertent or negligent malpractice does not rise to a constitutional violation simply because the patient is a prisoner.<sup>45</sup>

Prisoners do, however, have a constitutional right to adequate health care.<sup>46</sup> While there is no general constitutional right to adequate health care, prisoners have such a right because of the unique circumstances of incarceration:

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37. *Id.* at 197–98.

38. *Id.*

39. *Id.*

40. *Id.*

41. U.S. CONST. amend. VIII.

42. *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

43. *Id.* at 104–05.

44. *Id.* at 105 (quoting *Palko v. Connecticut*, 302 U.S. 319, 323 (1937)).

45. *Id.* at 106.

46. *Id.* at 103.

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death. Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.<sup>47</sup>

In *Kosilek II*, the district court crafted a five-prong test relying on prior Eighth Amendment jurisprudence.<sup>48</sup> The test analyzed whether a prison official exhibited deliberate indifference towards an inmate's medical need in violation of the Eighth Amendment.<sup>49</sup> In order to succeed on a claim of deliberate indifference, an inmate must show that: (1) she has a serious medical need; (2) the treatment sought is the only adequate treatment; (3) the DOC knows that the inmate is at a high risk of harm if she does not receive the treatment sought; (4) the DOC denied the treatment not because of any good faith, reasonable security concerns, or for any other legitimate penological purposes; and (5) the DOC's unconstitutional conduct will continue in the future.<sup>50</sup>

#### **A. The First Prong: Is There a Serious Medical Need?**

The first thing that an inmate must show to succeed on an Eighth Amendment claim is the presence of a serious medical need.<sup>51</sup> Courts have found a serious medical need through evidence of a substantial risk of serious harm if the medical condition is not adequately treated.<sup>52</sup>

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47. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (internal quotations and citations omitted).

48. *Kosilek II*, 889 F. Supp. 2d at 200 (D. Mass. 2012).

49. *Id.* at 229.

50. *Id.*

51. *Id.*

52. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other grounds*, 104 F.3d 1133 (9th Cir. 1997) (en banc) ("A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain'" (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976))).

In determining whether a condition rises to the level of a serious medical need the court may consider any relevant factors including whether a reasonable doctor or patient would perceive the medical need in question as “important and worthy of comment or treatment,” whether the medical condition significantly affects daily activities, and “the existence of chronic and substantial pain.”<sup>53</sup> A physician’s notice that the medical need mandates treatment is a good indication of a serious medical need.<sup>54</sup> However, such diagnosis is not always necessary as the harm may be so obvious that even a layperson would recognize the necessity of a doctor’s attention.<sup>55</sup>

Additionally, a serious medical need is not limited to physical ailments.<sup>56</sup> An inmate’s psychological condition could rise to the level of a serious medical need if it subjects the inmate to a substantial risk of harm if the condition is not adequately treated.<sup>57</sup> However, whether the injury from a mental illness is sufficiently severe to meet this standard may be difficult to determine because the symptoms can be less obvious than physical ailments.<sup>58</sup> In such cases, it is especially important to rely on a doctor’s diagnosis or the outward manifestations of the mental illness.<sup>59</sup>

Under this standard, the district court found that Kosilek’s condition constituted a serious medical need.<sup>60</sup> Following the decision in *Kosilek I*, gender identity specialist Dr. Seil evaluated Kosilek on

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53. *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003) (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

54. *Mahan v. Plymouth Cnty. House of Corr.*, 64 F.3d 14, 18 (1st Cir. 1995).

55. *Id.* See also *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (“a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious”); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998):

A prisoner who nicks himself shaving obviously does not have a constitutional right to cosmetic surgery. But if prison officials deliberately ignore the fact that a prisoner has a five-inch gash on his cheek that is becoming infected, the failure to provide appropriate treatment might well violate the Eighth Amendment. Compare *Arce v. Banks*, 913 F. Supp. 307, 309–10 (S.D.N.Y. 1996) (small cyst-like growth on forehead not sufficiently serious), with *Gutierrez v. Peters*, 111 F.3d 1364, 1373–74 (7th Cir. 1997) (large cyst that had become infected was a serious medical condition).

*Id.*

56. *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991).

57. *Estelle*, 429 U.S. at 106.

58. See *Kosilek II*, 889 F. Supp. 2d 190, 213 (D. Mass. 2012).

59. *Id.*

60. *Id.* at 229.



behalf of the DOC.<sup>61</sup> Using the Standards of Care, Dr. Seil diagnosed Kosilek as suffering from gender identity disorder.<sup>62</sup> Dr. Seil pointed to the outward manifestations of Kosilek's condition—the suicide and mutilation attempts—and explained that Kosilek is at risk of serious harm because of her condition.<sup>63</sup> Therefore, the district court was correct to find that Kosilek's condition was a serious medical need.

### **B. The Second Prong: Is the Treatment Sought the Only Adequate Treatment?**

Under the Eighth Amendment, an inmate is entitled to adequate care—not necessarily *ideal* care.<sup>64</sup> Prisons are unique settings and ideal treatment may not be available because of cost, feasibility, or other factors.<sup>65</sup> Outside of prison, medical treatment is not always available on an equal basis—sometimes better treatment costs more money.<sup>66</sup> Just because a person is in prison does not entitle them to the best care money can buy. As stated by the Second Circuit, “[s]o long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.”<sup>67</sup>

Adequate care is subject to a reasonableness standard.<sup>68</sup> Such care must be “at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”<sup>69</sup> For individuals with gender identity

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61. *Id.* at 218.

62. *Id.*

63. According to a gender disorder specialist who evaluated Kosilek, “[i]f transitioning to female is not within her control, she may take control of the situation by ending her own life.” *Id.*

64. *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir. 1987) (“[I]t is plain that an inmate deserves adequate medical care.”) (emphasis omitted). *See also* *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (“The Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’”); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (explaining that the Constitution “does not mandate comfortable prisons”).

65. *See DeCologero*, 821 F.2d at 43–44.

66. INSTITUTE OF MEDICINE, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 125 (Brian D. Smedley, et al. eds., 2009).

67. *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998). In *Chance*, a dentist provided by the prison recommended that an inmate have two teeth pulled to treat his overbite and a cavity. *Id.* at 701. Based on a letter from a different dentist, the inmate wanted a filling instead of having his teeth pulled but the correctional officials ignored his request. *Id.* The inmate alleged an Eighth Amendment violation. *Id.* at 700.

68. *Kosilek II*, 889 F. Supp. 2d 190, 230 (D. Mass. 2012).

69. *DeCologero*, 821 F.2d at 43.

disorder, the Standards of Care are generally considered the benchmark for what constitutes adequate care.<sup>70</sup>

Sex reassignment surgery was the only adequate treatment for Kosilek.<sup>71</sup> All but one of the doctors who testified in *Kosilek II* agreed that sex reassignment surgery for Kosilek was both medically necessary and the only adequate treatment for her gender identity disorder.<sup>72</sup> The only doctor who disagreed does not practice in accordance with the Standards of Care.<sup>73</sup> The evidence showed that antidepressants and psychotherapy would not eliminate Kosilek's mental anguish or the risk of serious harm.<sup>74</sup> Therefore, the district court was correct to find that sex reassignment surgery was the only adequate treatment.

**C. The Third Prong: Is the DOC Aware of and Disregarding Excessive Risk to the Inmate's Health or Safety?**

The mens rea of "deliberate indifference" lies between negligence and purposeful or knowing.<sup>75</sup> The Supreme Court explicitly discussed the meaning of deliberate indifference in *Farmer v. Brennan*:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harms exists, and he must also draw the inference.<sup>76</sup>

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70. *Kosilek I*, 221 F. Supp. 2d 156, 166 (D. Mass. 2002). See also *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 65–67 (2010) (The United States Tax Court relied on the "Standards of Care" to determine that the Internal Revenue Service's disallowance of a medical expense deduction for hormone therapy and sex reassignment surgery was improper.).

71. *Kosilek II*, 889 F. Supp. 2d at 237 (D. Mass. 2012).

72. *Id.* at 233.

73. *Id.* at 232.

74. *Id.* at 236.

75. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

76. *Id.* at 837.

It follows that for there to be an Eight Amendment violation, an official must first perceive of the risk of serious harm. The test for deliberate indifference is subjective.<sup>77</sup>

However, an objective perspective is not wholly absent from the test for deliberate indifference.<sup>78</sup> Whether an official is aware of a serious medical need is a question of fact for the usual fact finders.<sup>79</sup> The jury can determine that an injury or significant risk may be so obvious that the official must have had actual knowledge of the risk, thus factoring into the jury's determination of the official's level of awareness.<sup>80</sup>

One complication that may arise lies in identifying the official who owes a duty towards the inmate.<sup>81</sup> The Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement to inmates, which includes adequate medical care.<sup>82</sup> However, prison officials are likely not trained to properly evaluate whether an inmate is at risk of serious harm, and they may have a duty to seek outside guidance from medical specialists.<sup>83</sup> In such cases where an official seeks outside guidance from a medical specialist, the prison official may have satisfied the duty to the inmate, and the liability then shifts to the medical specialist to properly determine whether the inmate is at risk of serious harm.<sup>84</sup>

Once the inmate shows that a prison official was aware of the harm, the inmate must then show that the official failed to act reasonably.<sup>85</sup> A prison official who acts reasonably in attempting to ameliorate an inmate's risk of harm is not liable even if the harm ultimately resulted.<sup>86</sup>

Following *Kosilek I*, the new DOC commissioner, Dennehy, sought the opinion of a gender identity disorder specialist from the University of Massachusetts to assess Kosilek's condition.<sup>87</sup> The specialist agreed with the previous assessments and advised

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77. *Id.*

78. *See id.* at 842–43.

79. *Id.* at 842.

80. *Id.* at 842–43.

81. *Kosilek II*, 889 F. Supp. 2d 190, 237 (D. Mass. 2012).

82. *Farmer*, 511 U.S. at 832.

83. *Kosilek II*, 889 F. Supp. 2d at 237 (D. Mass. 2012).

84. *See Kosilek II*, 889 F. Supp. 2d at 237.

85. *Farmer*, 511 U.S. at 844–45.

86. *Id.*

87. *Kosilek II*, 889 F. Supp. 2d at 237–39.

Commissioner Dennehy that Kosilek suffered from a severe case of gender identity disorder and was at a serious risk of harm.<sup>88</sup> Both Commissioner Dennehy and the specialist acknowledged that they were aware of the risk of harm to Kosilek.<sup>89</sup> Commissioner Dennehy also acknowledged that she did nothing to prevent the harm to Kosilek, but contended that her denial of Kosilek's need for surgery was justified in light of security concerns.<sup>90</sup> This brings us to the fourth prong of the Eight Amendment analysis.

**D. The Fourth Prong: Was the Treatment Denied Because of Good Faith, Reasonable Security Concerns?**

While inmates' health is a concern, prison officials' duty to maintain order and safety in an environment as volatile as a prison cannot be understated.<sup>91</sup> A prison official must sometimes juggle the duties to some inmates against the security concerns, interests, or safety of other inmates. The court noted that "medical 'need' in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands. . . . [S]o long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference' . . . ."<sup>92</sup> Thus, if an official's decision to withhold medical care from an inmate is justified by safety concerns, the denial of care is not unreasonable and thus is not unconstitutional.<sup>93</sup>

Whether the official acted in good faith requires a determination of the official's subjective intent.<sup>94</sup> Again, this subjective intent is a question of fact for the fact finder and may be evidenced by the official's behavior—indeed, "it is enough for the prisoner to show a wanton disregard sufficiently evidenced by 'denial, delay, or interference with prescribed health care.'"<sup>95</sup>

In *Kosilek II*, the court determined that the DOC's reasons for denying Kosilek sex reassignment surgery were not reasonable and

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011).

92. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994)).

93. *Kosilek I*, 221 F. Supp. 2d 156, 182 (D. Mass. 2002).

94. *Battista*, 645 F.3d at 453.

95. *Id.* (quoting *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991)).

were, in fact, pretextual.<sup>96</sup> Commissioner Dennehy fired the gender identity specialist, Dr. Seil, after he advised that sex reassignment surgery was the only adequate treatment for Kosilek.<sup>97</sup> Commissioner Dennehy then brought in a new specialist whom she knew opposed sex reassignment surgeries.<sup>98</sup>

Moreover, the DOC's argument that granting Kosilek's request will set a precedent for other inmates to manipulate the prison system by pretending to be in a similar situation as Kosilek is weak.<sup>99</sup> Kosilek is asking to have her genitalia removed. Any inmate pretending to be similarly situated to Kosilek would be doing more than feigning an illness to stay home from school—they would be making a significant, life-changing sacrifice. The court felt that it was doubtful that an inmate would make such a disingenuous sacrifice.<sup>100</sup> The DOC's security concerns were unsubstantiated and their actual reasons for denying Kosilek treatment were personal and political.<sup>101</sup> Therefore, the district court correctly determined that the DOC did not deny the surgery for good faith, reasonable security concerns.

#### **E. The Fifth Prong: Will the Denial of Treatment Continue?**

The courts are reluctant to issue injunctions against prison officials; this is partially because of the unique settings of prison and because it is assumed that prison officials know what is best for the prison.<sup>102</sup> Courts prefer to interfere only as a last resort, letting prison officials handle prison issues.<sup>103</sup> Thus, if there is no indication that the denial of treatment will persist, a court will refrain from issuing an injunction.

The district court found that, without an injunction, the DOC would continue to deny Kosilek the sex reassignment surgery.<sup>104</sup> Kosilek had to doggedly fight with the DOC for treatment, dating

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96. *Kosilek II*, 889 F. Supp. 2d 190, 239–40 (D. Mass. 2012).

97. *Id.* at 240.

98. *Id.*

99. *Id.* at 241.

100. *Id.*

101. *Id.* at 247.

102. *Id.* at 248. *See also* *Farmer v. Brennan*, 511 U.S. 825, 846–47 (1994) (“[A] district court should approach issuance of injunctive orders with the usual caution, and may, for example, exercise its discretion if appropriate by giving prison officials time to rectify the situation before issuing an injunction.”).

103. *Kosilek II*, 889 F. Supp. 2d at 248 (D. Mass. 2012).

104. *Id.* at 250.

back to *Kosilek I* and her request for hormonal treatment.<sup>105</sup> Moreover, the commissioner consistently ignored every doctor that recommended sex reassignment surgery for Kosilek,<sup>106</sup> and used prison safety as a pretext.<sup>107</sup> Based on the commissioner's delay, the court inferred that without an injunction, Kosilek would not receive the requisite treatment.<sup>108</sup>

The court found that Kosilek satisfied each of the five prongs, and concluded that the DOC violated her Eighth Amendment right to the only adequate treatment for her serious medical need.<sup>109</sup> Accordingly, the court issued an injunction ordering the DOC to provide Kosilek with sex reassignment surgery.<sup>110</sup>

### **III. Prolonged Administrative Segregation for an Indeterminate Sentence Violates the Eighth Amendment's Protection Against Cruel and Unusual Punishment**

While the court took an unprecedented step in *Kosilek II* by ordering the state to pay for an inmate's sex reassignment surgery, it also tried to keep the decision as narrowly tailored as possible.<sup>111</sup> The court circumscribed its decision at receiving the surgery. The court explicitly refused to detail any specific instructions as to who should perform the surgery, or where it should be done.<sup>112</sup> Furthermore, the court refused to instruct on how the DOC should handle Kosilek's incarceration after her surgery:

The DOC has the discretion to make good faith, reasonable decisions concerning security . . . . If the DOC decides that Kosilek must be segregated and locked up 23 hours a day to reasonably assure his safety, it is foreseeable that the court may be asked to decide whether that decision is reasonable and made

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105. *Id.* at 249.

106. *Id.*

107. *Id.*

108. *Id.* at 250.

109. *Id.* at 250–51.

110. *Id.*

111. *Id.*

112. *Id.*

in good faith. That issue, however, is not now ripe for resolution.<sup>113</sup>

Is the issue of what to do with Kosilek after her surgery actually unripe? After all, potential harm can constitute an Eighth Amendment violation.<sup>114</sup> Indeed, the serious medical need that satisfies the first prong of the Eighth Amendment analysis is a substantial *risk* of serious harm. The Supreme Court has explained that an inmate does not need to actually be injured before she can seek a remedy; an unsafe life-threatening condition will suffice.<sup>115</sup>

Once Kosilek has her surgery, she will be a woman, at least anatomically. It is not difficult to imagine the kind of harm that awaits if she returns to a men's prison.<sup>116</sup> To have a substantial risk of harm for Eighth Amendment purposes, it is not necessary to wait for Kosilek to return to the men's prison after her surgery and see whether she is raped or otherwise harmed.

Following the Prison Rape Elimination Act of 2003, the Department of Justice is required to compile and publish a report on the incidence and effects for prison rape.<sup>117</sup> The 2012 report indicates that 9.6% of former inmates reported one or more incidents of sexual victimization during their most recent period of incarceration.<sup>118</sup> According to the report, among males who were bisexual, thirty-four

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113. *Id.* at 250 (citation omitted).

114. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

115. *Id.* Writing for the majority, Justice Byron White noted:

That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.”)

*Id.*

116. See *Law & Order: Special Victims Unit: Fallacy* (NBC television broadcast Apr. 18, 2003) (The episode centers around a murder at a party where a woman killed a young man, claiming he was trying to rape her. As the investigation continues, Detectives Benson and Stabler learn that the woman, Cheryl, is actually a biological man who is taking hormones and planning a sex reassignment operation. Cheryl takes a plea deal, but then decides to take her chances at trial when she discovers that the law requires her to be housed with male inmates. She is convicted, sent to the male prison, and violently gang raped within a few hours of incarceration.).

117. 42 U.S.C. § 15606(d) (2008).

118. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON RAPE ELIMINATION ACT DATA COLLECTION ACTIVITIES 1 (2012), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4373>.

percent reported being sexually victimized by another inmate; among males who were homosexual, thirty-nine percent reported being victimized by another inmate.<sup>119</sup> There are no statistics on anatomical women in men's prisons, but with the number for homosexual males as high as it is, one may assume that once Kosilek returns to the men's prison after her surgery, she will be at a high risk of rape.

The district court in *Kosilek II* should have assessed the constitutionality of the different placements for Kosilek post-sex reassignment surgery. The act of being raped is certainly a serious harm worthy of consideration in evaluating the first prong of the deliberate indifference test.<sup>120</sup> For the court to have found the issue unripe, it must have found that the likelihood of sexual assault is too attenuated to constitute a substantial risk.<sup>121</sup> However, even if the issue is not yet ripe for Kosilek, *Kosilek II* is merely the first in what will likely be a series of cases dealing with inmates undergoing sex reassignment surgeries and the litany of issues that attend such situations. Therefore, it is prudent to assess the constitutionality of the different placement options for inmates who undergo such an operation.

The court in *Kosilek II* stated that it would not rule on placing Kosilek in extended isolation, thus acknowledging that placing Kosilek into general population at a male prison would not be acceptable care.<sup>122</sup> There are two types of isolation: punitive and administrative segregation.<sup>123</sup> Punitive segregation is used for disciplinary measures; administrative segregation is used as a protective device, either protecting the inmate from harm or protecting others from the inmate.<sup>124</sup> If Kosilek were placed in isolation after surgery, it would be administrative segregation to protect her from violence and sexual assault by other inmates. This Note now examines whether it would be constitutional for Kosilek to be placed in administrative isolation for twenty-three hours a day or whether the Eighth Amendment demands that she be sent to a women's facility.

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119. *Id.* at 2.

120. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

121. *See Kosilek II*, 889 F. Supp. 2d at 251.

122. *Id.*

123. GEOFFREY ALPERT, *LEGAL RIGHTS OF PRISONERS* 113 n.36 (1978).

124. *Id.*



**A. Spending Twenty-Three Hours Per Day in Isolation for the Indeterminate Future Places Kosilek at a Substantial Risk of Serious Harm**

One tactic for disciplining prisoners is to place them in isolation. Isolated confinement is not necessarily unconstitutional, but it can be. As the Supreme Court has noted:

It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual. If new conditions of confinement are not materially different from those affecting other prisoners, a transfer for the duration of a prisoner's sentence might be completely unobjectionable and well within the authority of the prison administrator. It is equally plain, however, that *the length of confinement* cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months.<sup>125</sup>

While the Supreme Court has not yet addressed the constitutionality of prolonged punitive isolation, it addressed the issue of prolonged solitary confinement in *Hutto v. Finney*.<sup>126</sup> In *Hutto*, the Court upheld the lower court's decision to place a limit on the number of days a prisoner could remain in isolation.<sup>127</sup> In the lower court decision, the district court discussed how mental harm satisfies the first prong of the deliberate indifference test and, in light of that finding, held that thirty days was the maximum possible period to keep an inmate in isolation.<sup>128</sup> However, the court explained that, "[i]f at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but under conditions which are not punitive."<sup>129</sup> The district court acknowledged the seriousness of the harm that could result from

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125. *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) (emphasis added).

126. *Id.*

127. *Id.*

128. *Finney v. Hutto*, 410 F. Supp. 251, 278 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

129. *Id.*

leaving an inmate in prolonged isolation, but left an escape hatch for allowing such isolation when the motivation is not punitive; this will be significant in analyzing the fourth prong of the deliberate indifference test.<sup>130</sup>

Isolation lasting longer than thirty days satisfies the first prong because it puts an inmate at a substantial risk of serious harm.<sup>131</sup> Kosilek would remain in isolation for the duration of her sentence, which would likely be much longer than thirty days.<sup>132</sup> Thus, keeping Kosilek in isolation for an indeterminate sentence after her surgery places her at a substantial risk of serious harm and satisfies the first prong of the deliberate indifference test.

**B. Ordering an Injunction Preventing Kosilek From Being Placed in Isolation Would Be the Only Adequate Treatment**

If leaving Kosilek in isolation for a prolonged amount of time results in serious harm, then the only treatment would be to remove her from isolation. The only remedy that would prevent deterioration of her mental health caused by prolonged isolation is an injunction preventing the DOC from placing Kosilek in isolation for an indeterminate sentence. That injunction would lead to equally dangerous harm by placing Kosilek in general population and leaving her at a high risk of sexual assault.<sup>133</sup>

The DOC would have to either place Kosilek in a women's facility or create a transgender ward. While those are options, they are still just natural progressions from the singular remedy of removing Kosilek from isolation. Just as the court in *Kosilek II* found that the only adequate treatment for her gender identity disorder was sex reassignment surgery but did not prescribe the specific details of the surgery, so too can the court prohibit prolonged isolation for Kosilek without prescribing the specific details of which facility she should be placed in. Thus, an injunction against prolonged isolation is the only adequate remedy.

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130. *Id.*

131. *Id.*

132. In 2013, Kosilek was only in her early 60s and serving a life sentence. See *Kosilek I*, 221 F. Supp. 2d 156, 163 (D. Mass. 2002).

133. See *supra*, notes 117–19 and accompanying text.

### C. The DOC Knows of the Risk of Harm to Kosilek If She is Placed in Prolonged Isolation

This prong of the deliberate indifference test is more complicated than the first two prongs because of the subjective element; it is difficult to say precisely what the DOC commissioner actually knows. However, as the court explained in *Kosilek II*, the objective evidence of harm can be so obvious that a finder of fact could infer that the commissioner had to be aware of the harm.<sup>134</sup>

A good starting point to determine what Commissioner Dennehy likely knows is to look at the standards and regulations on prisoner isolation in Massachusetts. Kosilek is incarcerated at Massachusetts Correctional Institution–Norfolk, under the DOC's jurisdiction.<sup>135</sup> According to DOC policies, an inmate in isolated protective custody must have better access to mental health care than inmates in general population.<sup>136</sup> The policy stresses the importance of heightened mental health care for inmates who have been placed on psychotropic medication, have a substantial mental health history, or are deemed to be in crisis.<sup>137</sup> This demonstrates a heightened monitoring of the mental health of isolated prisoners—evidence that Commissioner Dennehy is aware of a more fragile mental health state for isolated inmates than those in general population. However, she might not be aware of the extent of the seriousness of the harm.

Additionally, the policy dictates that any prisoner in isolation has the status of their confinement reviewed every 120 days and any administrative isolation is not allowed to last more than ninety days.<sup>138</sup> However, there is an emergency clause:

Whenever in the opinion of the commissioner of his designee, or the superintendent of a state correctional facility, an emergency exists which requires suspension of all or part of these regulations, the commissioner of his designee or the superintendent may authorize such suspension, provided that any suspension lasting more

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134. See *Kosilek II*, 889 F. Supp. 2d 190, 237–38 (D. Mass. 2012).

135. *Id.* at 213.

136. MASSACHUSETTS DEPARTMENT OF CORRECTION, DEPARTMENT PROTECTIVE CUSTODY UNITS, 103 D.O.C. § 422.03(3)(b) (2013) (mandating weekly mental health examinations), available at <http://www.mass.gov/eopss/docs/doc/policies/422.pdf>.

137. *Id.*

138. 103 D.O.C. §§ 422.02(1), 422.05(1) (2013).

than forty-eight (48) hours must be approved by the commissioner.<sup>139</sup>

Therefore, barring an emergency, Kosilek should not be kept in administrative segregation longer than ninety days. Even if Commissioner Dennehy determines that Kosilek's unique situation merits placing her in segregation for longer than the ninety-day maximum, the policy's procedural requirements make it impossible for the commissioner to be unaware of the prolonged isolation. Additionally, the procedural safeguards against prolonged isolation are enough to indicate to the commissioner that there is a significant risk of harm that could result from such isolation.

There are enough warning signs of the danger of prolonged isolation available to the commissioner that it is reasonable to assume that a jury would find the commissioner aware of the potential harm.

**D. The DOC Did Not Place Kosilek in Isolation Because of Good Faith, Reasonable Security Concerns or for Any Other Legitimate Penological Purpose**

Even though the commissioner knows of the significant risk of serious harm from administrative segregations of indeterminate lengths, the segregation may be constitutional if it serves a legitimate penological purpose. The purpose for segregating Kosilek would be to protect her from harm caused by other inmates. However, the option to send Kosilek to a women's facility, coupled with Kosilek's tumultuous relationship with Commissioner Dennehy, indicate that the decision to place Kosilek in isolation is not made in good faith.

Considering the continual efforts of Commissioner Dennehy, and the DOC in general, to combat Kosilek's every effort to transition into a woman,<sup>140</sup> an assertion of securing Kosilek's safety would be a pretext for her segregation. The DOC would likely be punishing Kosilek for the trouble she gave the DOC, or even for being a person living with gender identity disorder.

A person is typically assigned to either a men's prison or women's prison based on the policy of the department of corrections within that jurisdiction.<sup>141</sup> Most states look to a person's genitalia

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139. 103 D.O.C. § 422.06 (2013).

140. For a detailed discussion of Commissioner Dennehy and the DOC's refusal to provide treatment for Kosilek, see *Kosilek II*, 889 F. Supp. 2d 190, 238–45 (D. Mass. 2012).

141. Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 516 (2000).

when placing her or him in a prison.<sup>142</sup> Anyone who disagrees with their assigned prison may appeal to a judge for a change, but judges can rely on any relevant information in determining which facility is appropriate.<sup>143</sup> Typically a judge relies on public policy, personal beliefs, and dictionary definitions.<sup>144</sup>

If one's genitalia is the standard for determining to which facility to assign an inmate, this further strengthens the argument that keeping Kosilek in isolation in a men's prison for safety concerns is pretextual. The typical DOC policy for someone with female genitalia is to place them in the female prison. The DOC is actually creating a danger by keeping Kosilek in isolation in the men's prison. Transferring Kosilek to a women's facility would eliminate a great deal of the risk of harm that would result if Kosilek were released into general population at a men's prison. She would not be as high of a target for sexual assault at a women's prison because she would not provide the sole opportunity for heterosexual intercourse—anatomically speaking.

Transferring Kosilek to a women's facility would essentially eliminate the risk of harm presented by the men's facility. Because she would not be as likely a candidate for sexual assault, she would no longer warrant indefinite segregation. She would no longer be at risk for physical assault or the deterioration of her mental health from prolonged isolation. While there is no requirement that the DOC pick the *best* method for assuring Kosilek's safety,<sup>145</sup> the obvious and easy solution of sending her to a women's facility constitutes evidence that the real reason the DOC is keeping Kosilek isolated is unrelated to her own safety. If the motivation were to ensure her safety, the DOC would simply send her to a women's facility. Here, it is difficult to believe that safety is the DOC's real concern, when an alternative solution is so clearly superior.

For other inmates who receive sex reassignment surgery while incarcerated, the best way to judge the intentions of an official who chooses to keep the inmate in solitary confinement will be to look at

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142. *Id.* at 522.

143. *Id.* at 516.

144. JOAN M. BURDA, GAY, LESBIAN, AND TRANSGENDER CLIENTS: A LAWYER'S GUIDE 180–81 (2008).

145. *Cf. N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979) (finding that the Transit Authority's blanket policy of refusing to hire anyone using methadone in order to promote safe drivers might not have been the least restrictive means for achieving that goal but it was not unconstitutional).

other post-operative alternatives. Future department of corrections commissioners might not have as acrimonious a history with the inmate as Commissioner Dennehy had with Kosilek. Moreover, the Supreme Court has acknowledged that prisoner safety is a compelling interest,<sup>146</sup> so absent the bad history, future inmates may have difficulty proving that a commissioner is not acting in good faith. The best method will be to look at the effectiveness of various solutions.

#### **E. Kosilek's Prolonged Isolation Will Continue in the Future**

Although the DOC has not yet said whether the plan for Kosilek after her surgery will be prolonged isolation, the court should still proscribe such behavior. As stated previously, Kosilek does not have to wait to be harmed to seek injunctive relief.<sup>147</sup>

Furthermore, once Kosilek or any inmate who has received sex reassignment surgery is placed in prolonged isolation, she is likely to remain in prolonged isolation well into the future. The reason for placing the inmate in segregation is to protect her from the general population, thus she is not part of the general population. The alternative to isolation is a transfer to another prison, and if that were the DOC's plan, then there would be no need for an indeterminate sentence of administrative segregation—the DOC would just send the inmate to the women's facility.

The entire issue here is whether the DOC can keep a prisoner in segregation *indeterminately*. There is no indication that indeterminate segregation will cease unless an injunction is granted.

#### **IV. Even if Kosilek Does Not Have an Eighth Amendment Claim Against Prolonged Isolation, She Might Have a Fourteenth Amendment Equal Protection Claim**

The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>148</sup> The Supreme Court has read the Fourteenth Amendment to mean that when a state action makes economic classification of individuals, the action must be rationally related to a legitimate state interest.<sup>149</sup> When the class affected is a discrete or insular minority, then the state action should be viewed with higher scrutiny than an

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146. *Johnson v. California*, 543 U.S. 499, 512 (2005).

147. *See Kosilek I*, 221 F. Supp. 2d 156, 250–51 (D. Mass. 2002).

148. U.S. CONST. amend. XIV.

149. *Beazer*, 440 U.S. at 591–93.

action that makes economic classifications.<sup>150</sup> A reviewing court must use strict scrutiny to analyze all racial classifications.<sup>151</sup> For a state action to survive strict scrutiny, the state action must be narrowly tailored to further a real and compelling government interest.<sup>152</sup>

In *Johnson v. California*, the plaintiff was an inmate challenging the California Department of Corrections' ("CDC") policy of separating new inmates by race for up to sixty days upon their arrival in the correctional system.<sup>153</sup> The CDC claimed that its policy was necessary to prevent racial gang violence.<sup>154</sup>

The Supreme Court held that the CDC's policy was subject to strict scrutiny, explaining that even benign racial classifications must undergo strict scrutiny.<sup>155</sup> The Court held that though prison security and discipline constituted compelling state interests, a racial classification was an inappropriate means of achieving that purpose.<sup>156</sup> When a race-neutral means of achieving the goal is available, racial classification is not sufficiently narrowly tailored.<sup>157</sup>

If Kosilek finds herself in isolation, her case will be similar to Johnson's. Both were placed in segregated facilities—Johnson due to his race and Kosilek due to her transgenderism. In light of *Johnson*, the DOC would not be able to keep Kosilek in segregated confinement if the classification were analyzed under strict scrutiny. Despite the compelling interest of prison safety, the available alternative of sending her to a women's prison means that the administrative segregation is not narrowly tailored. However, the difference between a classification based on race and one based on gender can shift the level of scrutiny a reviewing court might give to such a classification.<sup>158</sup>

The Supreme Court has given gender classification an intermediate scrutiny standard—higher than rational basis, but not as high as the strict scrutiny standard used for racial classifications.<sup>159</sup> But Kosilek's altered gender status deviates from the traditional

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150. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

151. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

152. *City of Cleburne, Tex. v. Cleburne Living Ctr*, 473 U.S. 432, 440 (1985).

153. *Johnson v. California*, 543 U.S. 499, 502 (2005).

154. *Id.* at 502–03.

155. *Id.* at 505–06.

156. *Id.* at 513.

157. *See id.* at 513.

158. *See Craig v. Boren*, 429 U.S. 190, 198–99 (1976).

159. *See id.*

concept of gender and could call for a different level of scrutiny by the courts. The Supreme Court classifies certain groups<sup>160</sup> as protected classes, deserving of strict scrutiny when they are legislated against because of the greater public's unfounded biases that the burdened class is not as worthy or deserving as others.<sup>161</sup> Because these biases are so popular, the legislature is likely to be affected by these discriminations so the courts have to view state actions that might reflect these discriminations with higher scrutiny. Gender receives an intermediate level of scrutiny because the differences between men and women can be real and might support some state action.<sup>162</sup>

Transgender individuals frequently suffer from discrimination,<sup>163</sup> and biases they endure are more akin to the unfounded discrimination against people of a different race, than attributable to the physical differences between men and women.<sup>164</sup> They are harassed in public, attacked, and lose their jobs just for being transgender or gender non-conforming.<sup>165</sup> These types of discrimination also result in mistreatment by the government.<sup>166</sup> Even in *Kosilek's* case, Commissioner Dennehy's denial of treatment was partially based on her belief that the operation would be politically unpopular.<sup>167</sup>

The biases against transgender people are precisely the types of biases that merit classification as a protected class by the courts. The biases are unfounded and so popular as to have an effect on

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160. These include classifications based on race, alienage, or national origin. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

161. *Id.*

162. *Id.* at 440–41.

163. JAMIE M. GRANT, ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 10 (2011).

164. Compare *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 745 n.10 (1982) (discussing the history of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function) with *Hirabayashi v. United States*, 320 U.S. 81, 100 (noting that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,” and that “racial discriminations are in most circumstances irrelevant and therefore prohibited.”).

165. *Id.*

166. In the National Transgender Discrimination Survey, 22 percent of the respondents were denied equal treatment by a government agency or official, twenty-nine percent reported police harassment or disrespect, and twelve percent had been denied equal treatment or harassed by judges or court officials. *Id.* at 5.

167. *Kosilek II*, 889 F. Supp. 2d 190, 247 (D. Mass. 2012).



legislation. If the courts agree and grant Kosilek and other transgender Americans status as a protected class, then the DOC's placing Kosilek in extended isolation should be analyzed under strict scrutiny standard, which it would not survive. Indefinite segregation is not sufficiently narrowly tailored.

### Conclusion

Although the court in *Kosilek II* refrained from discussing whether it is a violation of the Eighth or Fourteenth Amendments for the DOC to place Kosilek in prolonged isolation the issue is ripe. The Eighth Amendment protects against certain future harm. Prolonged isolation in general poses a risk to an inmate's mental health and the indefiniteness of Kosilek's potential isolation would only add to that harm. The DOC is aware of the risk prolonged isolation would present to Kosilek's mental health because it has specific protocol in place to handle the timing of prolonged isolations. Moving Kosilek to a woman's facility is the only method to resolve harms of prolonged isolation because removing Kosilek from isolation and placing her in the general population would place her at a high risk of sexual violence. Likewise, Kosilek's prolonged isolation would continue because the alternative of placing her in general population is untenable. The court should have ordered that as a component of Kosilek's judgment, the DOC cannot place her in prolonged isolation and should transfer Kosilek to a woman's facility.